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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

CISCO SYSTEMS, INC.,

Plaintiff,

vs.

ARISTA NETWORKS, INC.,

Defendant.

CASE NO. 5:14-cv-5344-BLF

**CISCO'S OPPOSITION TO ARISTA
NETWORK INC.'S MOTION TO STRIKE
[THE] DECLARATION OF KEVIN
ALMEROTH (DKT. NO. 91-1)
SUBMITTED IN SUPPORT OF
PLAINTIFF CISCO SYSTEMS, INC.'S
OPENING CLAIM CONSTRUCTION
BRIEF**

Date: March 18, 2015
Dept.: Courtroom 5

DEMAND FOR JURY TRIAL

1 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

2 Plaintiff Cisco Systems, Inc. (“Cisco”) opposes Arista Network, Inc.’s (“Arista”) Motion
3 to Strike the Declaration of Kevin Almeroth (“Motion”) (Dkt.144). Arista seeks an order striking
4 Professor Almeroth’s Declaration and three publicly available documents he cites in his
5 declaration because it contends that Cisco failed to disclose the substance of Professor Almeroth’s
6 testimony. Arista’s Motion is without merit and should be denied.

7 Cisco properly disclosed its intent to rely on Professor Almeroth’s testimony for its claim
8 construction positions. Indeed, Arista admits that it was aware of Cisco’s intent to rely on
9 Almeroth’s testimony for every disputed claim term no later than August 24, 2015. Moreover,
10 Arista’s Motion fails to articulate any way in which it was prejudiced by Cisco’s alleged
11 insufficient disclosure. Given Cisco’s timely disclosure of its intent to rely on Professor
12 Almeroth, the real question raised by Arista’s Motion is why it has never proposed a practical
13 solution, such as a rebuttal expert or changes to its claim construction positions. Had Arista done
14 so, the parties could have met and conferred in good faith or sought the Court’s guidance months
15 ago, instead Arista did nothing more than state that it reserved its right to later object. This
16 Motion is more about tactics than addressing any alleged violation of the rules or prejudice to
17 Arista. Accordingly, Arista’s Motion should be denied.

18 **II. ARGUMENTS**

19 Motions to strike generally are disfavored and “should be denied unless the matter has no
20 logical connection to the controversy at issue and may prejudice one or more of the parties to the
21 suit.” *Reflex Packaging, Inc. v. Lenovo (U.S.), Inc.*, No. C 10-01002 JW, 2011 WL 7295479, at *2
22 (N.D. Cal. Apr. 7, 2011) (denying motion to strike expert declaration in support of claim
23 construction positions) (internal citations omitted).

24 **A. Cisco Properly Disclosed Its Intent to Rely on Professor Almeroth’s Testimony**

25 Cisco properly and sufficiently disclosed Professor Almeroth’s testimony. *See, e.g., Reflex*
26 *Packaging*, 2011 WL 7295479, at *2. The crux of Arista’s argument is that Cisco’s disclosures
27 failed to provide a description of the substance or summarize the content of Professor Almeroth’s
28 testimony. (Motion at 2.)

1 Arista is wrong. The *Reflex Packaging* court expressly rejected the same argument,
 2 holding that a plaintiff's disclosure that it intended to use the opinion of its expert that, to one of
 3 ordinary skill in the art in the field of the asserted patent, the terms at issue would have the
 4 meaning attributed to it by the Plaintiff, "support[s] a finding that Plaintiff adequately disclosed
 5 the expert testimony it intended to use." *Reflex Packaging*, 2011 WL 7295479, at *2. Further, the
 6 plaintiff in *Reflex Packaging* disclosed its intent to rely on expert testimony *after* its Patent Local
 7 Rule 4-2(b) statement. In contrast, Arista admits that Cisco timely disclosed, on August 24, 2015,
 8 that it may rely on Almeroth's testimony for "each [disputed] term...and to address the meaning
 9 and subject matter of the asserted patent claims as they would be understood by those of ordinary
 10 skill in the art at the time any patents were filed, to address the proper construction of various
 11 claim terms in light of the intrinsic and extrinsic evidence and/or the meaning of the term to one of
 12 ordinary skill in the art, to rebut claim construction positions taken by Arista and/or any of its
 13 experts, and to otherwise assist the Court in construing the asserted patents." (Dkt. No. 95-1
 14 (Cisco's P.L.R. 4-2 Disclosure) at 1-2) (emphasis added). Thus, Cisco properly disclosed its
 15 intent to rely on Professor Almeroth's testimony *more than three months prior* to the deadline
 16 for Arista's responsive claim construction brief.

17 Likewise, the parties' P. L.R. 4-3 Statement, filed on September 18, 2015, disclosed that
 18 "Cisco may provide testimony from the disclosed expert ...to address the meaning and subject matter
 19 of the asserted patent claims as they would be understood by those of ordinary skill in the art at the
 20 time any patents were filed, to address the proper construction of various claim terms in light of the
 21 intrinsic and extrinsic evidence and/or the meaning of the term to one of ordinary skill in the art, to
 22 rebut claim construction positions taken by Arista and/or any of its experts, and to otherwise assist the
 23 Court." (Dkt. No. 70 at 3.) Although not required, Cisco further disclosed that, as to the '886 patent,
 24 it may rely on Professor Almeroth's testimony for: the level of ordinary skill in the art and the terms
 25 "extensible markup language (XML)" and "one CLI token." (*Id.*) As to the '526 patent, Cisco
 26 further disclosed that it may rely on Professor Almeroth's testimony to rebut Arista's arguments as
 27 that the "generic command" and "the validating step including identifying one of the elements as a
 28 best match relative to the generic command" are indefinite to one of ordinary skill in the art. (*Id.*)

1 Therefore, Cisco disclosed *even more detail* about Professor Almeroth's forthcoming testimony
 2 than required by the Patent Local Rules.

3 Arista's attempt to distinguish *Reflex Packaging* is unpersuasive. Although that court
 4 noted that the moving party's own disclosures had a similar level of detail as the non-moving
 5 party's, the court's decision undertook an historical analysis of the Patent Local Rules and found
 6 they now require "a less detailed description" to reserve the right to use expert testimony in
 7 connection with claim construction. *Reflex Packaging*, 2011 WL 7295479, at *2. And as noted
 8 above, Cisco provided Arista far more and far earlier disclosure than the plaintiff in *Reflex*
 9 *Packaging*.

10 **B. Arista Did Not Suffer Any Prejudice**

11 Arista's Motion also should be denied because Arista was not prejudiced. Indeed, Arista's
 12 Motion fails to identify any prejudice it allegedly suffered as a result of Cisco's reliance on
 13 Professor Almeroth's testimony or the three pieces of publicly available documents about which
 14 Arista now complains. At most, Arista's Motion vaguely suggests that it may have changed its
 15 own claim construction positions, but Arista does not suggest what those different positions may
 16 be. (Motion at 3 ("Cisco's September 18, 2015 disclosure came on the same day that Arista was
 17 expected to commit to binding claim construction positions.")) And if Arista truly believed the
 18 disclosure was insufficient or needed more specificity to frame its own constructions (although
 19 one assumes Arista had already done so when it pled that the claims are neither infringed nor
 20 valid), Arista should have proposed practical solutions, such as using a rebuttal expert or altering
 21 their own constructions, instead of merely using boilerplate language to reserve their right to later
 22 object.

23 Arista cannot credibly contend it was prejudiced by Cisco's reliance on Professor
 24 Almeroth's testimony, or Professor Almeroth's citation to three publicly available documents.
 25 The Court allowed the parties to set their own claim construction discovery and briefing schedule.
 26 (Dkt. 106 at 23:18-24.) Accordingly, Arista had ample time to address and test the substance of
 27 Professor Almeroth's declaration and the three publicly available documents cited by Professor
 28 Almeroth. *See, e.g., Aylus Networks, Inc. v. Apple, Inc.*, No. 3:13-cv-04700-EMC, Dkt. 82, Civil

Minutes (Oct. 20, 2014) (denying motion to strike expert declaration and documents cited by the expert declaration but not previously disclosed, as described by Dkts. 69, 77, and 79).

Arista had five weeks after Cisco filed its opening claim construction brief to prepare its responsive brief; three weeks after receiving Professor Almeroth's declaration and supporting exhibits to conduct expert discovery, including a deposition; and two weeks after deposing Professor Almeroth to file its responsive claim construction brief.

Arista had ample opportunity to prepare for and depose Professor Almeroth, and rebut his testimony. Arista could have, and did, question Professor Almeroth about every disputed claim term in his declaration. Arista's responsive claim construction brief cites to Professor Almeroth's declaration and deposition testimony in multiple places. (Dkt. 142 at 6, 8, and 11). Moreover, Arista voluntarily ended its examination of Professor Almeroth after only half a day on the record, not taking the entire time offered by Cisco, and notably covered none of the three documents that Arista now seeks to exclude. Arista had ample time to question Professor Almeroth about his declaration and cited exhibits, and voluntarily chose not to ask about documents it now seeks to exclude. Likewise, Arista could have but chose not to address any of these documents in its responsive claim construction brief. Arista's litigation conduct belies its contention that it was prejudiced by Professor Almeroth's testimony or those three documents.

II. CONCLUSION

Cisco properly disclosed Professor Almeroth's testimony and, separately, Arista cannot specify any prejudice it suffered because Arista had sufficient time and opportunity to conduct expert discovery and depose Professor Almeroth.

Accordingly, Arista's Motion should be denied.

DATED: December 21, 2015

Respectfully submitted,

/s/ Sean S. Pak

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